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No. 80-1887

In the Supreme Court of the United States

OCTOBER TERM 1980

CLYDE K. THOMPSON,

Petitioner,

vs.

JOHN STETSON, Secretary of the United States Air Force, LaVERN E. WEBER, Maj. Gen. Chief, National Guard Bureau, SCOTT M. MATHESON in his capacity as governor of the State of Utah and commander-in-chief of the Utah National Guard, UTAH NATIONAL GUARD, MAURICE L. WATTS, Maj. Gen., Adjutant General, UTAH NATIONAL GUARD ADVISORY BOARD, and RONALD E. CHYTRAUS, Brig. Gen., Chief of Staff for Air, EARL R. FRANCIS, Col., Deputy Chief of Staff for Air, JOHN L. MATTHEWS, Col., Deputy for Operations, RAY P. GREENWOOD, JR., Col., Air Commander, ROBERT L. MONSON, Lt. Col., LAWRENCE G. HAYWOOD, Maj., individually and in their official capacities as officers of the Utah Air National Guard,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Bryce E. Roe and David E. Leta
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution require that officers in the Utah Air National Guard, who are subject to selective retention review after 20 years' service and are required under 32 U.S.C. § 709(b) to maintain their military status as a condition of their civilian employment, be afforded a hearing before they are terminated from the military?

2. Whether the opinion of the Court of Appeals represents a significant abandonment of its Article III power to interpret the United States Constitution?

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JOHN STETSON, Secretary of the United States Air Force, LaVERN E. WEBER, Maj. Gen. Chief, National Guard Bureau, SCOTT M. MATHESON in his capacity as governor of the State of Utah and commander-in-chief of the Utah National Guard, UTAH NATIONAL GUARD, MAURICE L. WATTS, Maj. Gen., Adjutant General, UTAH NATIONAL GUARD ADVISORY BOARD, and RONALD E. CHYTRAUS, Brig. Gen., Chief of Staff for Air, EARL R. FRANCIS, Col., Deputy Chief of Staff for Air, JOHN L. MATTHEWS, Col., Deputy for Operations, RAY P. GREENWOOD, JR., Col., Air Commander, ROBERT L. MONSON, Lt. Col., LAWRENCE G. HAYWOOD, Maj., individually and in their official capacities as officers of the Utah Air National Guard,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Clyde K. Thompson, plaintiff and appellant in the courts below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit herein.

OPINIONS BELOW

The opinion of the United States District Court for the District of Utah granting defendants' motion for summary judgment is not published or reported but is set forth at page A-1 of the appendix. The opinion of the Court of Appeals affirming the order of the United States District Court is not published or reported but is set forth at page A-8 of the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1980. Petitioner filed a petition for rehearing on January 27, 1981, in accordance with an order granting an extension of time for filing the petition. By order entered February 11, 1981, the petition for rehearing was denied by the Court of Appeals. In accordance with Supreme Court Rule 20.4 this petition must be filed on or before May 12, 1981. The jurisdiction of the Court is evoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the United States Constitution which are involved in this case are as follows:

Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Amendment XIV, Section 1:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, Section 2, Paragraph 1:

> The judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their authority . . .

32 U.S.C. § 709(a) through (e). The text of this statute is set forth at page A-14 of the appendix. The pertinent portions involved in this appeal are as follows:

> (b) Except as prescribed by the secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the secretary concerned for that position.
>
> * * *
>
> (e) Notwithstanding any other provision of law and under regulations prescribed by the secretary concerned—
>
> (1) A technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned . . .

Air National Guard Regulation 36-06. The complete text of this regulation is set forth in the appendix at page A-17. The regulation requires that all Air National Guard commissioned officers and warrant officers, with over 20 years of qualifying service for retirement, be reviewed each year for consideration of retention or separation. The stated purpose of the regulation is to maintain "[a] continuing program of vitalization . . . to avoid loss of combat readiness in a maturing force." A board of officers appointed by the State Adjutant General is appointed for the purpose of making retention or separation recommendations. The board meets secretly, reviews records and information respecting each officer, and makes recommendations to retain or separate the officers reviewed. The State Adjutant General passes upon these recommendations and affected officers are advised of the ultimate decision without a statement of reasons or specific findings. No notice of intent to separate or opportunity for hearing is provided.

STATEMENT OF THE CASE

Prior to September 30, 1978, petitioner was a lieutenant colonel in the Utah Air National Guard (hereinafter the "Guard") and was also employed by the Guard as a full-time air technician in the capacity of a tactical control operations officer. Petitioner's civilian duties were substantially the same as his military duties and required the same military competence rating. Petitioner had over 22 years of qualifying service for retirement as a commissioned officer, and fulfilled all military and civilian qualifications for the positions which he

held. During his tenure with the Guard, petitioner was never disciplined, reprimanded, suspended, relieved of duty or advised by his superiors that he suffered from any deficiency. There is no dispute that respondents could not terminate petitioner from his civilian position "for cause."

On May 15, 1978, petitioner received a formal notification that he was to be considered again by the Selective Retention Review Board of the Guard for retention or separation during the Board's 1978 deliberations. On that date, no adverse information respecting his military or civilian performance was contained in petitioner's official personnel file. Petitioner had been subject to selective retention review during two previous years (1976 and 1977), and his military record had improved since these previous reviews. During 1976, petitioner received a promotion from the rank of major to the rank of lieutenant colonel and his performance scores on current Officer Effectiveness Reports (OER's) were higher than scores on previous OER's considered by the Review Board during former deliberations.

The pertinent regulations respecting selective retention and separation do not afford affected officers the right to a hearing. Officers subject to review are advised that they may submit a letter to the Board inviting attention to any matter that they feel important or relevant in the review of their records. No other procedures are provided by regulation or local custom either before or after a retention recommendation is made by the Board. Officers are not given a notice of specific charges or deficiencies, no opportunity is af-

forded to hear or confront adverse evidence, there is no opportunity to be represented by counsel, and no opportunity is available to present rebuttal evidence. Subsequent consideration of the Board's recommendation by the State Adjutant General, the National Guard Bureau and the Secretary of the Air Force is perfunctory; reviewing entities traditionally do not alter the Board's recommendations. There is also no opportunity for the affected officer to participate in reviews conducted by higher authorities. In addition, there is no administrative appeal from a final decision.

The aforementioned process is peculiar to the Utah Ntaional Guard in many ways. Officers in active military service and reservists also undergo periodic review, but are afforded at least a statement of reasons and an opportunity for appeal before a non-retention decision becomes final. Other state National Guard units, such as Alaska, provide an opportunity for a hearing before officers in similar circumstances are terminated. There is no Guard regulation, however, which requires a hearing before separation and no regulation prohibits hearings. The Utah Guard simply does not provide an opportunity for a hearing.

As a result of their deliberations during 1978, the Selective Review Board recommended that petitioner be separated as an officer of the Guard. Over 50 officers were considered by the Board during its 1978 term, but petitioner was the only officer not recommended for retention. Furthermore, during the entire three-year history of the selective review process in Utah, petitioner has been the only civilian technician who, as an offic-

er, was not recommended for military retention. The recommendation of the Board was approved by the Adjutant General for the State of Utah, the National Guard Bureau, and the Secretary of the Air Force. Upon termination of his military status, petitioner was terminated immediately from his full-time civilian employment as an air technician, resulting in an immediate and substantial loss of income, fringe benefits and retirement pay.

On September 26, 1978, plaintiff filed a complaint against respondents in the United States District Court for the District of Utah, Central Division, Civil No. C-78-0359, alleging, among other things, that the procedures through which he had been terminated deprived him of property without due process of law in violation of the First and Fourteenth Amendments of the United States Constitution. By an order dated June 25, 1979, the District Court granted summary judgment in favor of respondents, holding that there were "no genuine issues of material fact in dispute and that defendants [were] entitled to judgment of no cause of action as a matter of law." Accordingly, by its decision of December 29, 1980, the Court of Appeals affirmed the District Court's judgment.

Petitioner seeks this writ because the question presented is an important question of constitutional law which was expressly reserved by this Court, without opinion, in the case of *Tennessee v. Dunlap*, 426 U.S. 312, 316 n. 3 (1976). The writ should also be granted because the decision of the Court of Appeals represents

a significant abandonment of exclusive judicial power. Although squarely faced with the issue, neither of the courts below has expressed an opinion on plaintiff's due process claim.

FEDERAL JURISDICTION

The jurisdiction of the District Court was evoked pursuant to 28 U.S.C. §§ 1343 and 1331.

REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED TO ANSWER THE QUESTION LEFT OPEN BY THIS COURT IN ITS DECISION OF *TENNESSEE v. DUNLAP*.

The due process question involved in this case is precisely the question reserved for subsequent decision by this Court in *Tennessee v. Dunlap*, 426 U.S. 312 (1976). In that case, a National Guard technician and full-time civilian employee, challenged the automatic termination of his civilian employment in accordance with 32 U.S.C. § 709(e)(1) upon expiration of his enlistment and the refusal of the Guard to permit him to reenlist. The question raised in that case was whether termination of *civilian employment* was a violation of the due process clause when the termination resulted solely from a loss of military status since, without a loss of military rank, a civilian could only be terminated "for cause" in accordance with 32 U.S.C. § 709(e)(3). This Court denied the petitioner's claim in the *Tennessee v. Dunlap* case stating:

> The clear and *sole* import of subsection (3), then, is that if a technician remains a member of the National Guard and is otherwise eligible for continued employment under subsections (1) and (2), he may nevertheless be discharged for cause. There can be no significance, therefore, to the claim that the denial of reenlistment to respondents was designed to circumvent the requirements of section 709(e)(3). Nor can section 709(e)(3) provide the foundation for any due process claim in this case, since the property interest it creates in continued employment is confined in all events, to the guardsman's term of enlistment.[3] 426 U.S. at 316.

Footnote 3 of the opinion, however, is significant. In this footnote the Court said:

> Respondent asserts in his brief that he had a property interest in the form of a legitimate expectation of reenlistment and continued employment. *See, Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972). This assertion was not pleaded in respondent's complaint, was not considered by the District Court or the Court of Appeals and accordingly is not before us.

It is precisely the point addressed in this footnote which forms the basis for petitoner's due process claim in the instant case, namely, that he had a property interest in continued *military recognition* which could not be revoked without a hearing. Unlike the petitioner in *Tennessee v. Dunlap*, however, petitioner has made this assertion in his complaint and at every appropriate stage in the lower courts even though neither of these courts has chosen to address this substantial constitutional question.

II

THE WRIT SHOULD BE GRANTED BECAUSE THERE ARE SUBSTANTIAL CONSTITUTIONAL QUESTIONS INVOLVED IN THIS CASE.

It is a fundamental, unwaivering principle of our government that the state may not act to finally deprive an individual of his liberty or property interests without affording him some kind of hearing to secure against arbitrary action. *Dent v. West Virginia*, 129 U.S. 114, 123 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Anti-facist Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring). The fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). There is no dispute in judicial circles respecting these fundamental principles.

While the principle of "due process" is easy to state, it is difficult to apply. The kind of process which is due, and the circumstances which require that it be given, are questions which continue to plague this Court and other judicial scholars. Understandably, there is wide divergence of opinion on these questions.

The bench mark of whether a sufficient "property interest" exists to evoke the protection of the due process clause is whether a standard exists which controls or limits the exercise of discretion. In other words, if there is a yardstick with which to measure, at a hearing, the propriety of proposed governmental action, then a

hearing is required so that the individual's conduct may be tested against the yardstick. The standard may arise from statute, rule, express contract, implied contract, "mutually explicit understandings," or even "the policies and practices of the institution." In *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972), and in *Bishop v. Wood*, 426 U.S. 341 (1976), standards were absent and the right to hearing was denied even though the Court "eschewed" rigid or formalistic limitations on the protection of procedural due process. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), and in *Barry v. Barchi*, 443 U.S. 55 (1979), standards were found to exist and a hearing was required. Finally, in *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court remanded the case to the District Court for the purpose of determining whether sufficient standards had been promulgated by the state to give rise to a property interest. Thus, the existence of standards governing the exercise of discretion is the common thread which unites this Court's significant "property interest" decisions.

In the instant case, petitioner contends, as he did in the lower courts, that state law, federal law, Air Force Regulations, policies and practices of the Guard, and "express representations" create standards and expectations which entitle him to evoke the protections of the due process clause. Once an individual becomes "recognized" as an officer of the Air National Guard, he is entitled to retain his commission and his recognition unless he fails to mantain the physical and mental *qualifications* required of his office. 32 U.S.C. §§ 307(a) and 323(a). The capacity and general fitness of an officer

in the Guard may be investigated at any time. Hence, the cornerstone of an officer's right to continued federal recognition is his ability to remain qualified for his particular office.

The qualification of an officer in the Guard is a matter which is regulated and standardized. *See, e.g.*, 32 C.F.R. §§ 564.3 and 564.5. Air National Guard Regulation 36-06 contains separately stated criteria in paragraph 10(e) which must be considered by the Board in determining whether to retain or separate an officer. These standards include such objective criteria as the officer's performance as shown by his OER's training reports and letters of commendation, his availability in light of the demands of his civilian occupation, his past record in and dedication to the Guard, his retirement status as an air technician, his rated capability and potential, and other related criteria. The regulations focus on the officer's continuing "qualification" to ensure a combat-ready force. Standards such as height, weight, fitness, education and rank, are all subject to independent verification.

State law recognizes an officer's right to a continued commission unless there is "cause" for his removal, § 39-1-30, Utah Code Anno. (1953), and Utah expressly recognizes the right to a hearing in the event an officer's qualifications are questioned. § 39-1-58, Utah Code Anno. (1953). Other state and federal laws, including Guard regulations respecting civilian terminations, demonstrate an overall policy and practice of discharging officers only after an adequate showing of cause as

determined by an impartial body. Finally, petitioner contends that air technicians were expressly told that they would be retained until maximum retirement age if they remained qualified. Past practice of the Guard, in fact, shows that generally technicians have been retained until maximum retirement.

These federal statutes, regulations and customs which are only briefly highlighted here for the purpose of this petition, create "standards" and "reasonable expectations" which evoke application of the due process clause. In essence, so long as the petitioner remained qualified, he was entitled to continue his military status until attaining maximum retirement age. The question of whether or not petitioner satisfied these qualification standards was a matter which should have been addressed in an administrative hearing, with adequate notice and an opportunity to confront and introduce evidence.

More importantly, after 22 years of unblemished military service, and two previous successful retention reviews, an officer reasonably expects that he will be retained in the military until achieving maximum retirement age so long as he remains qualified to perform his duties. If his qualifications are challenged, he reasonably expects that he will receive notice of his alleged shortcomings and an opportunity to be heard before an impartial body. This expectation is particularly realistic where the officer is performing identical civilian duties on a full-time basis without criticism. In this setting, a hearing comports with our societal notion of basic fairness.

III

THE WRIT SHOULD BE GRANTED TO CLARIFY A SPLIT OF AUTHORITY IN THE LOWER COURTS.

Lower courts are far from unanimous in resolving the issue presented by this petition. For example, in *Walker v. Alexander*, 569 F.2d 291 (5th Cir. 1978), the court denied a National Guard officer's claim that he had a property right to continued federal recognition and a right to a hearing before his civilian employment with the Guard could be automatically terminated. However, the only property interest advanced by the officer in that case was the fact that he "also held a civilian position from which he could not be discharged except for cause." Therefore, the case does not appear to have clearly addressed the question reserved by this Court in *Tennessee v. Dunlap, supra*. However, in *Ne-Smith v. Fulton*, 615 F.2d 196 (5th Cir. 1980), the same circuit appears to have retreated, at least in part, from its earlier decision by holding that a claim of arbitrary and capricious termination states a claim under 42 U.S.C. § 1983 if defendants acted under color of state law in cancelling a civilian technician's employment. The court also strongly suggested that a property interest in reenlistment may be based on "mutually explicit understandings" that reenlistment would be automatic absent an adverse rating during the previous enlistment. 615 F.2d at 203.

In *Knehans v. Alexander*, 566 F.2d 312, 314 (D.C. Cir. 1977), the D.C. Circuit held that when an officer is terminated automatically for having been passed over

twice for promotion, he has no property interest sufficient to evoke the protections of the due process clause. The Court of Claims, however, in *Buchanan v. United States*, 621 F.2d 373 (Ct. of Cl. 1980) held, on almost identical facts, that officers in a certain training program were entitled to a hearing before they could be terminated. *See, also, Rolles v. Civil Service Commission*, 512 F.2d 1319 (D.C. Cir. 1975) (recognizing the right to a hearing when military status is jeopardized) and *Holm v. Vance*, 567 F.2d 1125 (D.C. Cir. 1977) (foreign service officers, who were involuntarily retired pursuant to a statutory "up-or-out" requirement, entitled to a hearing because of mutual and explicit understandings fostered by the department). Other courts have held that implicit rules, understandings, customs and practices can form the basis for a property right giving rise to protections under the Fifth Amendment. *See, e.g., Paige v. Harris*, 584 F.2d 178, 181 (7th Cir. 1978); *Dumschat v. Board of Pardons*, 618 F.2d 216, 219 (2d Cir. 1980); *Brede v. Director*, 616 F.2d 407, 410 (9th Cir. 1980); *Ventetuolo v. Burke*, 596 F. 2d 476, 480 (1st Cir. 1979). The Tenth Circuit court's position on this question is uncertain because it chose not to address petitoner's constitutional claim.

The district courts are also divided respecting application of the due process clause in the military or governmental arena. For example, in *Bollen v. National Guard Bureau*, 449 F.Supp. 343 (W.D. Pa. 1978), in a situation almost identical to the case at bar, the court held that the plaintiff had a property interest in continued military recognition and also found that the pro-

cedural safeguards afforded by the military to protect that interest were "patently inadequate." 449 F.Supp. at 350. Other courts, however, have taken a more restrictive view of the due process clause. *See, Cushing v. Tetter*, 478 F.Supp. 960, 965 (D.R.I. 1979); *Owens v. Brown*, 455 F.Supp. 291, 299 (D. Conn. 1979).

A review of the cases demonstrates that courts throughout the nation are struggling with the due process concept of a "property interest" in the context of military service or special executive employment. In military cases, courts often refuse to decide the constitutional question at all for fear that to do so would constitute an unjustified intrusion into the exercise of military discretion. These courts often rely on the decisions of *Orloff v. Willoughby*, 345 U.S. 83 (1953), and *Schlesinger v. Ballard*, 419 U.S. 498 (1975) for support. The test often applied is that set forth by the Fifth Circuit in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). In the instant case, the Court of Appeals elected to take this latter approach holding that "the decision of the military establishment here sought to be challenged is not reviewable," even though the issue of justiciability was decided in petitioner's favor by the District Court. Obviously, this area of the law is one which cries out for guidance.

IV

THE WRIT SHOULD BE GRANTED TO DECIDE AN IMPORTANT ASPECT OF JUDICIAL POWER UNDER ARTICLE III OF THE CONSTITUTION.

Petitioner respectfully suggests that the Court of

Appeals misunderstood or misapprehended the issues involved in this case. The Court of Appeals discusses petitioner's due process argument on page 4 of its opinion as follows:

> The plaintiff urges that he was denied due process in that he was not afforded an evidentiary hearing, and that the remedy for such a failure is by a suit such as this. Termination of the *civilian position* by reason of separation as an officer is expressly provided for by statute (32 U.S.C. § 709) and creates no individual due process problem. (emphasis added)

Petitioner did not, and does not now, dispute this statement of the law which is this Court's holding in *Tennessee v. Dunlap, supra.* The issue presented by petitioner, however, is not whether he was denied due process because his civilian position was automatically terminated when he was separated from the military, but whether he was denied due process when his *military status* was revoked. This issue was not decided by this Court in *Tennessee v. Dunlop, supra.*

The Court of Appeals devotes a substantial portion of its opinion to the question of "justiciability." This question was extensively argued in the District Court and resolved in petitioner's favor. Respondents did not cross-appeal on this question. Justiciability involves judicial interpretation of the the scope of judicial power under Article III of the Constitution. "Justiciability" is not the same as "jurisdiction." There is no dispute that the District Court had jurisdiction to hear this controversy.

The Court of Appeals abdicated its exclusive judicial power under Article III of the Constitution to resolve controversies "arising under [the] Constitution" when it held that the issues raised by petitioner fell within the exclusive province of the "military establishment." Only a court can interpret the Constitution of the United States; the executive branch of government has neither the power nor the right to enter this exclusive judicial realm. In this action, petitioner has called into question, in an actual case and controversy, the interpretation and application of the Constitution of the United States to the procedures employed by the National Guard—a quasi-federal, quasi-state military institution. The question is not one involving the exercise of "military discretion." The deference by the Court of Appeals to the "military establishment" on the constitutional issue presented creates a dangerous precedent which greatly expands the power of the executive branch, concomitantly weakens the judiciary, and upsets the balance of power between the branches of government as established by the Constitution of the United States. *See, Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803); *Baker v. Carr*, 369 U.S. 186 (1962); *Powell v. McCormack*, 395 U.S. 486 (1969).

In this case, petitioner asked the Court of Appeals to interpret the Fifth and Fourteenth Amendments in light of the procedures employed by the Utah Air National Guard in terminating his *military status* as an officer. Deference to the "military establishment" on this question is contrary to Article III of the Constitution. The writ should be granted in this case as an ex-

ercise of this Court's supervisory authority over the Courts of Appeal so that the scope of Judicial power under Article III is not emasculated.

CONCLUSION

Historically, the issuance of a writ of certiorari by this Court has been reserved for cases of public importance. Questions involving the scope and interpretation of the Constitution are always questions of public importance. Two separate constitutional provisions are in issue in the case under consideration, namely, application of the due process clause to procedures employed in the National Guard for terminating the military status of officers with over 20 years' service, and application of the judicial power under Article III of the Constitution to review questions of this kind. Both of these issues have independent significance apart from petitioner's particular interest.

Issuance of the writ in this case provides the Court with an opportunity to resolve a constitutional question which it expressly reserved for later consideration in *Tennessee v. Dunlap*. The writ also will provide an opportunity for this Court to further clarify its definition of "property interest" in a situation which affects thousands of senior military officers each year. The writ will further provide a vehicle for guiding the lower courts which are struggling with difficult due process questions every day. Finally, issuance of the writ is required for the purpose of maintaining the integrity of the judicial power granted by Article III of the Constitution.

For all the foregoing reasons, Clyde K. Thompson, your petitioner, respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

David E. Leta
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CLYDE K. THOMPSON,
Plaintiff,

vs.

JOHN STETSON, Secretary of the United States Air Force, et al.,
Defendants.

No. C-78-0359

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND DISMISSING PLAINTIFF'S ACTION

Plaintiff Clyde K. Thompson has sued to recover damages and injunctive relief against the defendants, who include the Secretary of the Air Force, members of a selective retention advisory board, and the Governor of the State of Utah, by reason of his non-retention as an officer of the Air National Guard and the withdrawal of his federal recognition as such with resultant separation from his ANG civilian technician position effective October 6, 1978. Plaintiff claims jurisdiction of this court exists under 28 U.S.C. §§ 1343 and 1331 and pursuant to 5 U.S.C. §§ 702 and 704.

The law of the case has repeatedly been presented in connection with motions going to the pleadings, for interlocutory injunctive relief, in connection with dis-

covery problems, in discussions with reference to a pretrial order and finally with respect to defendants' motion for summary judgment now before the court. The parties have been represented by able, diligent and determined counsel. Hardly a significant issue of law or fact has escaped challenge at some point in the proceedings. However, few, if any, of the finer points which might bear particularly upon ordinary litigation remain sharply meaningful in view of the pervasive effect of the military system established by the Congress, consistent with constitutional provisions, and the essential justification of the ANG regulations and implementing actions of the defendants which emerge with no significant deficiencies following liberal discovery allowed by the court in recognition of the importance of the case, particularly to plaintiff but also to the defendants.

This case is abundantly ripe for summary judgment. After the motion for summary judgment was argued and submitted, counsel for plaintiff addressed a letter to the court to call attention to an additional authority the tenor of which the court had already accepted on the question of jurisdiction in reliance upon predecessor authority. Counsel added:

> Plaintiff seriously disputes the truth of several factual statements made in the depositions, especially with respect to times, places and occurrences respectng his competence, qualification, or behavior. The court will undoubtedly note that many such statements are hearsay, and that the witness did not observe the behavior or occurrence. Nevertheless, if the court relies upon particular factual matters contained in the deposi-

> tions, or contained in the argument of opposing counsel, as a basis upon which to grant defendant's motion, plaintiff requests the opportunity, in advance of the court's decision, to argue the evidence with respect to these factual matters.

I am somewhat at a loss to understand this statement since counsel had full opportunity to brief and argue the record before the court for the purpose of the motion for summary judgment. It must be apparent that after counsel's submission of such motions the court could not be reasonably expected to thereafter report to counsel that it had given or intended to give effect to proper portions of depositions in reaching a judgment, which the submission and Rule 56 itself contemplates, but that it will suspend judgment until after reporting its mental processes to counsel in advance and according still another opportunity to argue the effect of the record. But upon receipt of this letter I again considered whether, in view of plaintifff's obviously deep feeling that he has been unjustifiably victimized by the military, there has been a full and fair opportunity to develop the record and whether it is ripe for summary judgment. I conclude that there has been, and it is.

No determinative factual matters remain in doubt, the record is manageable and quite clear, and the determination of the ultimate issues of law would not be aided in this court or the court of appeals by the plethora of details which plaintiff urges upon the court for jury trial. What we are concerned with here is the exercise by the ANG and its officers and Board of reasonable discre-

tion in the discharge of their responsibilities in evaluating officer performance and potential in relation to the question of nonretention of plaintiff in the overall context of military tasks and missions, the authorities concerning which have been adequately outlined in the briefs.

In the entire record there is no substantial indication of arbitrary, capricious, or illegal conduct and little, if any, suggestion of irregularity in reaching the discretionary decision in question. The strongest points to the contrary are the Board's consideration of one letter from plaintiff's commanding officer which was not a part of the personnel file of the officer and subject to his inspection before plaintiff was called upon to comment concerning nonretention, possible consideration of an Officer's Effectiveness Report subsequently determined to be erroneous and void and an impression that plaintiff had breached the chain of command in making complaint against his "malassignment". The first two documents were cumulative and clearly could have had no determinative influence upon the Board's decision. Whatever conflicting version is considered of the details concerning the malassignment episode, the validity of the Board's decision would not thereby be thrown into question in view of all of the surrounding circumstances appearing without dispute, and would fall far short of suggesting any unconstitutional retaliation for the exercise of First Amendment rights as claimed by plaintiff.

To single out these three episodes at the heart of plaintiff's case risks their overemphasis in the light of

the record as a whole, which demonstrates a generally efficient, reasonable, circumspect, conscientious, good faith and responsible, albeit as to plaintiff's immediate superior barracks-type, performance on the part of the military personnel concerned, tempered by his and the Board's understandable sympathy with plaintiff in the previous decision to retain plaintiff, despite his recognized lack of potential for command, so that he could qualify for a pension. After he was permitted to so qualify, it comes with something less than perfect grace for plaintiff to assign that previous retention as reason for plaintiff's not availing himself of the opportunity he had prior to his nonretention to add to his record a letter of reasons why he should be retained in the year in question, and to assert a sort of estoppel against the Board for failing to give him special advance notice, which no other officer was entitled to and which every officer in plaintiff's position had reason to know, that he was being considered for nonretention in the year in question.

Nonetheless, the record also generally reflects credit upon the character, diligence and technical proficiency of plaintiff. The difficulty which led to his nonretention did not lie in these directions but in his perceived lack of potential for command in relation to his age, rank, educational efforts and training, and in view of military mission, regulations, circumstances and requirements. These were legitimate concerns of the Board, considered and acted upon in its discretion. Neither on the basis of the present record, nor by reason of any developments that can be realistically anticipated were the case to be

tried, would the substitution of the judgment of the court or a jury for the judgment of the military as so exercised be warranted in law or reason. Were it properly deemed to be, there could in effect be made a federal court case out of almost any nonretention or nonpromotion in the military.

Questions have been raised by the defendants concerning the jurisdiction of this court and related problems. I have concluded, not without concerns heretofore expressed, that especially as to plaintiff's constitutional claims this court has jurisdiction, that there is sufficient involvement of state authority by reason of custom and usage to have warranted civil rights relief should the facts have justified, that in any event federal question relief might have been granted upon a sufficient showing, that failure to further exhaust military remedies does not bar this court's consideration of the merits, that particularly as to equitable relief and in view of claims sounding in tort the Court of Claims should not be deemed to have exclusive jurisdiction, and that the Governor was properly made a party not by reason of his, or the state's possible liability, as such, but to have permitted the court to render effective any equitable relief which might have been warranted upon a sufficient record.

Piercing merely conclusionary allegations of the pleadings by the depositions, affidavits, and admissions properly before the court, considering the facts thereby properly established without dispute, and resolving conflicts, together with inferences reasonably to be drawn,

favorably to the plaintiff, I hold pursuant to Fed. R. Civ. P. 56 that there are no genuine issues of material fact in dispute and that defendants are entitled to judgment of no cause of action as a matter of law.

And such summary judgment of no cause of action against the plaintiff and in favor of the defendants is hereby made and entered, and plaintiff's complaint is dismissed on the merits.

Dated this 25th day of June, 1979.

A. Sherman Christensen
United States District Judge

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 79-1863

CLYDE K. THOMPSON, Lt. Col., Utah ANG, Tactical Control Operations Officer,

Plaintiff-Appellant,

v.

JOHN STETSON, Secretary of the United States Air Force, LaVERN E. WEBER, Maj. Gen. Chief, National Guard Bureau, UTAH AIR NATIONAL GUARD, MAURICE L. WATTS, Maj. Gen., Adjutant General, UTAH NATIONAL GUARD ADVISORY BOARD, and RONALD E. CHYTRAUS, Brig. Gen., Chief of Staff for Air, EARL R. FRANCIS, Col., Deputy Chief of Stafff for Air, JOHN L. MATTHEWS, Col., Deputy for Operations, RAY P. GREENWOOD, JR., Col., Air Commander, ROBERT L. MONSON, Lt. Col., LAWRENCE G. HAYWOOD, Maj., individually and in their official capacities as officers of the Utah Air National Guard,

Defendants-Appellees.

On Appeal From The
United States District Court
For The District Of Utah
Central Division
(D.C. Civil No. C-78-0359)

David E. Leta (Bryce E. Roe, with him on the brief), of Roe and Fowler, Salt Lake City, Utah, for Appellant

Craig Stephens Cook, Utah Air National Guard Judge Advocate (Paul N. Cotro-Manes, Utah Army National Guard Judge Advocate, James Holbrook, Assistant United States Attorney, and Lee Ford, Assistant Utah Attorney General, with him on the brief), Salt Lake City, Utah, for Appellees.

Before SETH, Chief Judge, BREITENSTEIN and BARRETT, Circuit Judges.

SETH, Chief Judge.

The plaintiff sought damages and injunctive relief under 42 U.S.C. § 1983 for the termination of his service as a Utah Air National Guard officer. Since plaintiff was no longer an officer in the Guard he could not continue his full-time civilian employment with the National Guard. The trial court granted summary judgment for the defendants and plaintiff has appealed.

Plaintiff had more than 20 years of service as an officer of the Air National Guard. The National Guard Regulations (36-06) required that he be discharged unless his retention was affirmatively recommended. Officers in this category each year would have to undergo a selective retention review by the Advisory Board.

Plaintiff had been recommended for retention on two previous reviews, but the Board undertaking the review on this occasion did not recommend his retention because it found his service was not essential to the mission of his unit. The Regulations required that plaintiff's commanding officer advise the Board whether

plaintiff should be retained. He so wrote the Board that plaintiff's services were not essential to mission capability.

The plaintiff had been advised that the Board would meet and review his status. He was told that he could submit a statement if he wished, but he did not do so. Plaintiff did not know that his commanding officer was going to submit an adverse recommendation, but he did have access to his personnel file. No hearing was provided for in the National Guard Regulations and none was afforded. The plaintiff did have the right to have a review by the Air Force Board for Correction of Military Records. Plaintiff was eligible for civil service retirement as a civilian employee and was transferred to the Air Force Reserve.

The record demonstrates that the National Guard followed all the applicable regulations in conducting the proceedings, and in fact plaintiff makes no serious contention to the contrary. There is no evidence in the record to show that the conclusion reached by the Advisory Board, and ratified by the Guard commander and the Air Force officers in the administrative chain, was arrived at in an arbitrary or capricious manner.

The determination made by the Board that the continuation of plaintiff's service was not essential to the mission of the unit was obviously a military matter. Also, the other factors recited by the Board including an absence of an indication of a potential for "increased responsibility or command," and a failure to take pre-

scribed military education coures, are likewise matters, standards, or factors peculiar to the military.

The plaintiff urges that he was denied due process in that he was not afforded an evidentiary hearing, and that the remedy for such a failure is by a suit such as this. The termination of the civilian position by reason of separation as an officer is expressly provided for by statute (32 U.S.C. § 709) and creates no individual due process problem.

The Court in Orloff v. Willoughby, 345 U.S. 83, considered a habeas corpus petition of a doctor in the Army who sought discharge because he had not been commissioned although inducted as a doctor. The Court found that he was not unlawfully retained in the service and that the judiciary had no authority to direct that petitioner be commissioned. The Court said: "Whether or not Orloff deserves appointment is not for judges to say. . . ." Since petitioner was not unlawfully retained in the service the Court indicated that there was no authority in the courts to order a discharge. The other issues related to duty assignments and the Court made it clear that no question for the courts was there involved. The Court then said:

> "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

See also Schlesinger v. Ballard, 419 U.S. 498, and the

references therein: "The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress . . . and with the President." We said in Schulke v. United States, 544 F.2d 453 (10th Cir.): "Discretionary decisions of the military are not subject to review by civilian courts." We were there referring to the hospitalization of a member of the Air Force, his return to active duty, and the refusal of the command to bring court-marital charges. *See* Barber v. United States, 412 F.2d 775 (5th Cir.); Smith v. Resor, 406 F.2d 141 (2d Cir.).

The three-judge court in Turner v. Egan, 358 F. Supp. 560 (D. Alaska), *aff'd*, 414 U.S. 1105, considered a comparable set of facts as the plaintiff there had been separated from the service by a Board decision under ANGR 36-05 and had been terminated thereby as an air technician. The Board there had not recommended plaintiff for retention as an officer considered essential to the combat capabilities of the unit. The court there said:

> "To permit judicial review of these internal military determinations clearly would tend to diminish the ability of the military to perform its vital duties."

The court in Charles NeSmith v. Fulton, 615 F.2d 196 (5th Cir.), considered the firing of a civilian technician who was a National Guard officer. The civilian firing was first and his military termination was about a week later. The court determined that the civilian technician was engaged in the military enterprise, that

the military characteristics of the position were recognized, and thus his firing involved an internal military matter. The court thus applied the standards for review of a matter based on a military decision. The court applied its Mindes v. Seaman, 453 F.2d 197 (5th Cir.). One of the important factors therein described to determine whether there should be a review was "[t]he extent to which the exercise of military expertise or discretion is involved" in the challenged decision. This we consider to be the basic consideration to be made. The decision here challenged was one within the discretion of the military and within its expertise in that it decided whether plaintiff's presence was necessary to the function of the unit. Whether an officer should be retained which in turn is based on how much the unit needs him is well within the realm of purely military decisions which are not reviewable. We refer to this element in the *Mindes* opinion but do not necessarily adopt the other tests therein described. *See* Noyd v. McNamara, 378 F.2d 538 (10th Cir.).

We must hold that the decision of the military establishment here sought to be challenged is not reviewable.

The judgment is affirmed for the reasons herein set forth.

32 U.S.C. § 709. *Technicians: employment, use, status*

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in—

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.

(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished

by the adjutant general of the jurisdiction concerned;

(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

. . .

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

ANG REGULATION 36-06
7 October 1977

Officer Personnel

SELECTIVE RETENTION OF AIR NATIONAL GUARD OFFICER PERSONNEL

This regulation outlines the procedures for establishment and conduct of advisory boards in the Air National Guard program for selective retention of officers beyond 20 years of qualifying service for retired pay. The word "he" as used in this regulation is intended to include both male and female, unless otherwise indicated.

1. Terms Explained:

a. Officer. For the purpose of being considered for retention under this regulation, the term "officer" includes all commissioned officers and warrant officers of the Air National Guard, includng Air Technicians, except for adjutants general, assistant adjutants general, and general officers.

Supersedes ANGR 36-06, 23 January 1976. (For summary of revised, deleted, or added material, see signature page.)

OPR: NGB/DPM (Lt Col John Hawthorne)
Approved: MG LaVern E. Weber, USA
Writer-Editor: Doreen M. White
DISTRIBUTION: B

b. Qualifying Service Creditable for Retired Pay. Combined total of commissioned, warrant, and enlisted service, which is creditable for retired pay under chapter 67 of Title 10, United States Code, including service with other DOD components.

2. Policy. Membership in the Air National Guard of the United States is not an inherent right of any individual. It is a privilege and confers upon an individual an obligation to serve in the active military service in the event of mobilization or emergency, or at such other times as the national security may require. A continuing program of vitalization of the Air National Guard is essential to avoid loss of combat readiness in a maturing force. Lack of promotion possibility and stagnation in the senior grades preclude providing for progression of qualified officers into positions of greater responsibility at the proper phase-points of their careers. To accomplish this program of officer development, all ANG commissioned officers and warrant officers with over 20 years of qualifying service for retirement will be reviewed each year for consideration of retention or sepaiton. This program will be achieved by controlled attrition and selective retention of officers qualified for retirement under chapter 67 of Title 10, United States Code.

a. A board of officers will be appointed by the State Adjutant General each calendar year for the purpose of making recommendations for the retention or separation of officers in the Air National Guard of that State. A single board may consider all officers or sep-

arate boards may be convened to consider officers by grades.

b. Boards may be convened at any time during the calendar year, but must be held in sufficient time to provide for reports to be received by the Chief, National Guard Bureau on or before 31 October.

c. Except as provided in paragraphs 6b and 13c, consideration under this regulation is mandatory for every eligible officer.

3. Criteria. Officers being considered for retention will meet the following criteria:

a. Must have accrued 20 or more years of service required to qualify for retired pay at age 60 on or before the date the board convenes. Officers previously selected for retention under any authority, including those retained past mandatory removal date under the provisions of sections 8848b, 8848c, and 8851c of Title 10, United States Code, will be included and again considered.

b. Must have been verified as being eligible for retired pay at age 60.

c. Are physically qualified for worldwide assignment. Prior to consideration by a board convened under this regulation, an officer whose last physical examination was conducted more than 1 year before the date the board convenes and required waiver of any factor will be given a new physical examination. Waiv-

ers granted more than 1 year before the date the board convenes must be reevaluated. In the event the waiver is revalidated by the National Guard Bureau, officer will then be considered by the board.

4. Procedures:

a. The Chief, National Guard Bureau will, not later than 31 January of each year, furnish each Adjutant General a listing of all officers under his jurisdiction who are certified as having 20 years of qualifying service creditable for retired pay.

b. The Adjutant General will verify that the officers listed meet the criteria specified above and will add to the listing any officers certified subsequent to production of the listing. He will send an informative letter on "controlled attrition and selective retention in the Air National Guard" to each officer concerned (attachment 1). NOTE: This letter and other sample letters attached to this regulation may be modified to fit local circumstances.

5. Appointment of Advisory Board. The board will be appointed by the Adjutant General of the State by composed order and addressed directly to the individuals appointed (attachment 2).

6. Composition of Advisory Board. The board will be composed of not less than three commissioned officers with voting authority. Members may be selected from the Air National Guard, and with the concurrence of the commander concerned, from other components of the Air Force. The majority of the members will be

from the Air National Guard. Tenure of office officers, other than the Adjutant General, are eligible to serve. The Adjutant General may not serve as a member of the board. All board members serve in their federally-recognized grade. Adjutants General may make arrangements for officers from outside their State to serve on the board.

a. The members of the board should possess wide command, management, and technical experience. Board members should be senior in federally-recognized grade to those being considered. As a minimum, the president of the board must be senior in grade to all officers being considered, and all board members must be senior in rank to the highest ranking officer being considered.

b. Members of the advisory board will be selected by the Adjutant General. His action to appoint the board serves as approval for retention of those board members who are officers of the ANG under his jurisdiction, and they need not be considered by the board.

7. Organization of Advisory Board. The senior member of the board (in federally-recognized grade) will be appointed president of the board. The junior member will be designated recorder, or, at the option of the Adjutant General, an additional officer, without vote, may be appointed to the board to act as recorder.

8. Communications for Advisory Board.

a. The individual being considered for selective retention will be notified of pending action.

b. An individual being considered for selective retention may write a letter to the advisory board inviting attention to any matter of record concerning himself that he feels important in the review of his record.

c. Letters of commendation or appreciation will be forwarded through channels to the State Adjutant General for referral to the advisory board prior to the convening date of the board.

d. Unit commander impact statement identified in paragraph 10 will be submitted to the board president before the convening of the board. Statements will be forwarded through command channels, and comments may be added at each level of command if appropriate.

e. Unsolicited communications that contain criticism or reflect upon the character, conduct, or motives of any officer will not be given to the advisory board.

9. Personnel Data for Advisory Board. Prior to convening the board, personnel files of each officer being considered will be screened to ensure the following information is included:

a. Verification of 20 years service for retirement.

b. Date last physical completed.

c. Current physical waiver (if applicable).

NOTE: List of officers to be considered by the board will be matched against the listing furnished by the National Guard Bureau at least 30 days prior to the anticipated date of the board.

10. Procedures for Conducting Advisory Board. The board will assemble at the time and place designated by the president and proceed as follows:

a. The order appointing the board will be read.

b. The following oath will be administered to the members by the recorder:

> "You (identify each member by grade and name) do swear (or affirm) that you will faithfully, without prejudice or partiality, and having in view both the special fitness of individuals and the efficiency of the Air National Guard, perform duties imposed upon you, and further that you will not divulge the proceedings or results of this board except to proper authority. So help you God."

c. The following oath will be administered to the recorder by the president of the board:

> "You (identify by grade and name) do swear (or affirm) that you will faithfully, without prejudice or partiality, and having in view both the special fitness of individuals and the efficiency of the Air National Guard, perform duties imposed upon you as a member and recorder of this board, and further that you will not divulge the proceedings or results of this board except to proper authority. So help you God."

d. The board will review all documents and make an evaluation of the future benefits that can be expected

to accrue to the Air National Guard from the continued service of each officer it considers. When the capability of a military unit will be affected by the loss of an officer being considered, recommendations from appropriate commanders should be included in the record before the board.

e. In arriving at an evaluation, the board should consider but not be limited to the following:

(1) Demonstrated performance and potential as reflected by the officer's effectiveness reports, training reports and letters of commendation.

(2) The availability of the individual for military activities in light of the demands of his civilian occupation.

(3) Past record of interest in and dedication to the Air National Guard.

(4) Status with regard to Air Technician retirement eligibility.

(5) Rated capability and potential as a crew-member in future years (rated only).

(6) Availability of replacement officer with less service who may be lost due to mandatory promotion if high grade vacancies do not exist.

(7) The ratio of officers in an age or service bracket as relates to maintaining an age/grade/service balanced force.

(8) Growth potential for replacing present leaders.

(9) Latest report of medical examination and physical fitness.

(10) Other factors bearing on a plan for assuring a viable combat ready military unit in future years.

f. The recommendations of the board are advisory only. Nevertheless, the members of the board must be aware that their recommendations will largely determine which officers are retained.

11. Actions on Advisory Board Reports:

a. Board:

(1) Other than the reports outlined in (2) and (3) below, no record of board proceeding will be prepared.

(2) A report of the board actions and recommendations will be submitted to the State Adjutant General for approval. (attachment 3).

(3) Any member of the board who disagrees with the recommendations of the majority of the board may submit a minority report. The member will sign both the minority report and the board proceedings, indicating on the board proceedings that the minority report is being submitted as an attachment (attachment 4).

(1) The State Adjutant General will review the recommendations of the advisory Board, including minority reports, and may approve or disapprove any specific recommendations.

(2) Upon the conclusion of his review the Adjutant General will make a report to the Chief, National Guard Bureau to the effect that selective retention review of the eligible officers of his State has been completed and that he approves retention or nonretention of the listed officers and warrant officers (attachments 5 and 6). Withdrawal of Federal recognition will be effective not earlier than the last day of the second month following the date of the Adjutant General's report to the National Guard Bureau. The Adjutant General may specify a later date for withdrawal of Federal recognition, but in no case later than 31 December of the current year.

(3) The Adjutant General will notify each officer concerned of the determination made as to his retention or separation (atchs 7 and 8).

c. Chief, National Guard Bureau:

(1) The Chief, National Guard Bureau will publish orders withdrawing Federal recognition of all officers not recommended for retention. The Adjutant General will be provided copies of the order withdrawing Federal recognition and will take necessary action to discharge the officer from the State and transfer him in grade to the Air Force Reserve in accordance with ANGR 36-05.

12. Separation for Other Reasons. This regulation in no way precludes initiation of action to separate an officer as specified in ANGR 36-05 or 36-014 before the effective date of discharge under this regulation. If

action is initiated to separate an officer for other reasons, separation under this regulation will be delayed until that action is completed.

13. Administrative Actions. If through administrative error an eligible officer is not considered as required by this regulation, or if the action taken as to any officer under this regulation is later set aside by competent authority, the Chief, National Guard Bureau may take one of the following actions:

a. Request that the Adjutant General concerned reconvene the board for the purpose of considering or reconsidering the affected officer.

b. Request that the Adjutant General concerned convene a new board for the purpose of considering or reconsidering the affected officer.

c. Waive, for the year in question only, the requirement that the affected officer be considered under this regulation. This action will be taken only when the Chief, National Guard Bureau determines that it is clearly required in the interest of justice and fairness, or that the passage of time makes it impractical to consider or reconsider the officer for the year in question before he is considered in due course for the following year.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

LA VERN E. WEBER, Major General, USA
Chief, National Guard Bureau

ROBERT H. NEITZ, Colonel, USAF
Executive, National Guard Bureau

FILED
JUL 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1887

In the Supreme Court of the United States

OCTOBER TERM, 1980

CLYDE K. THOMPSON, PETITIONER

v.

VERNE ORR, SECRETARY OF THE UNITED STATES AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. Petitioner brought this action for injunctive relief and damages under 42 U.S.C. 1983 and the Administrative Procedure Act, 5 U.S.C. 702, against various federal and state officials associated with the operation of the Utah Air National Guard, challenging his separation from service as an officer of the Guard and the resulting termination of his full-time civilian employment as a technician with the Guard. Petitioner was discharged from the Guard pursuant to Air National Guard selective retention procedures

which dictate that officers with 20 or more years of service be separated unless their retention is recommended by an Advisory Board after completion of an annual review. The district court granted respondents' motion for summary judgment, concluding that "there is no substantial indication of arbitrary, capricious, or illegal conduct * * *" (Pet. App. A-4, A-7).

The court of appeals affirmed (Pet. App. A-8 to A-13). The court held that the Utah Air National Guard had complied with all applicable regulations in the proceedings resulting in petitioner's separation and that the decision to separate petitioner from his military status was neither arbitrary nor capricious (*id.* at A-10). The court also held that petitioner had not been denied due process by the Guard's failure to afford him an evidentiary hearing prior to his separation, noting that the discretionary military decision was not subject to judicial review and that the termination of civilian employment resulting from the military decision was required by statute (*id.* at A-11 to A-13).[1]

2. a. Further review of petitioner's claim is unwarranted. This Court has consistently declined to review discretionary personnel decisions of the military. *Reaves* v. *Ainsworth*, 219 U.S. 296, 304-306 (1911); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953). See also *Rostker* v. *Goldberg*, No. 80-251 (June 25, 1981); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Gilligan* v. *Morgan*, 413 U.S. 1 (1973). Underlying these decisions is the principle that the primary business of the military is the public defense and "[t]he responsibility for determining how best our

[1] The court of appeals observed, however, that petitioner "had been advised that the Board would meet and review his status" and that "[h]e was told that he could submit a statement if he wished, but he did not do so" (Pet. App. A-10).

Armed Forces shall attend to that business rests with Congress * * * and with the President." *Schlesinger* v. *Ballard*, *supra*, 419 U.S. at 510.

The court of appeals correctly applied this principle to the present case. Selective retention decisions are made to insure the vitality of the National Guard, by preventing a loss of combat readiness stemming from retention of those not essential to the unit. Air National Guard Regulation ("A.N.G.R.") 36-06 (Pet. App. A-18). As the court below observed, "[w]hether an officer should be retained which in turn is based on how much the unit needs him is well within the realm of purely military decisions which are not reviewable" (*id.* at A-13). See *Mindes* v. *Seaman*, 453 F.2d 197, 201 (5th Cir. 1971).

b. Petitioner contends, however, that the Guard's failure to afford him an evidentiary hearing before terminating his military status constituted a denial of due process requiring judicial correction. This claim is insubstantial, because petitioner had no property interest in continued service with the Utah Air National Guard.[2] Under the applicable regulations, a Guard officer, such as petitioner, with 20 years of service must be separated unless his retention is affirmatively recommended by an Advisory Board

[2] In *Tennessee* v. *Dunlap*, 426 U.S. 312, 316 (1976), this Court held that 32 U.S.C. 709(e)(3), which provides for removal of a National Guard technician for cause, creates no basis for a due process claim by a person whose employment as a technician was automatically terminated under 32 U.S.C. 709(e)(1) by reason of his separation from military status. The Court declined to consider whether the Guard technician had a legitimate expectation of continued military status itself amounting to a property interest protected by due process, because the issue had not been properly preserved. 426 U.S. at 316 n.3.

after each annual review. A.N.G.R. 36-05, 36-06.[3] Under A.N.G.R. 36-06, the decision to retain an officer is entrusted to the discretion of the Adjutant General for the state involved, acting upon the recommendation of an Advisory Board (see Pet. App. A-18, A-24 to A-26). Thus, petitioner acquired no property interest in continued service. *Walker* v. *Alexander*, 569 F.2d 291, 293-294 (5th Cir. 1978); see *Board of Regents* v. *Roth*, 408 U.S. 564, 578 (1972).[4]

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[3] A.N.G.R. 36-05 provides, in pertinent part:

> All officers with 20 years of federal service qualifying for retirement pay (10 U.S.C. 1331) will be discharged unless recommended for retention by the appropriate board in accordance with A.N.G.R. 36-06.

[4] The cases cited by petitioner (Pet. 14-16) do not support his contention that an officer in the National Guard discharged under selective retention procedures has a property interest in continued military service. The courts in *NeSmith* v. *Fulton*, 615 F.2d 196 (5th Cir. 1980), and *Turner* v. *Egan*, 358 F. Supp. 560 (D. Alas.) (three-judge court), aff'd, 414 U.S. 1105 (1973), held that separations from military service and termination of employment of National Guard officers are discretionary military decisions not subject to judicial review. Several of the other cases cited by petitioner involved members of the military who, in view of the nature of their particular positions, had a legitimate expectation of continued military employment. *Buchanan* v. *United States*, 621 F.2d 373 (Ct. Cl. 1980) (officer in Navy reserve training program who could not be separated except for cause entitled to hearing prior to termination); *Bollen* v. *National Guard Bureau*, 449 F. Supp. 343, 346-347 (W.D. Pa. 1978) (National Guard officer had property interest in continued employment conferred by letter from Air National Guard Bureau which indicated that he would be exempt from selective retention procedures); *Rolles* v. *Civil Service Commission*, 512 F.2d 1319, 1327 (D.C. Cir. 1975) (civilian employee of Air Force

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

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who could be removed only "for cause" (5 U.S.C. 7501) had a legitimate claim of entitlement to continued employment).

Petitioner's reliance (Pet. 10-13) on various statutes and regulations to support his expectation of continued military retention is misplaced. Contrary to petitioner's assertion (*id.* at 11), neither 32 U.S.C. 307(a) nor 32 U.S.C. 323(a) provides that an officer of the Air National Guard is entitled to retain "his commission and his recognition unless he fails to maintain the physical and mental qualifications required of his office." Nor does Utah state law recognize an officer's right to continued commission absent "cause" for removal. Utah Code Ann. § 39-1-30 (1953 repl.) provides that all officers of the National Guard are subject to separation by "reason of resignation, disability, *or for other causes to be determined by a court-martial or other legally organized Board convened for that purpose*" (emphasis added).

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